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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF WASHINGTON

10  
11 R.W., individually and on behalf of his  
12 marital community,

13 Plaintiff,

14 v.

15 COLUMBIA BASIN COLLEGE, a  
16 public institution of higher education,  
17 RALPH REAGAN, in his official and  
18 individual capacities, LEE THORNTON,  
19 in his official and individual capacities.

20 Defendants.

Cause No. 4:18-cv-05089-RMP

PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
TO ESTABLISH DEFENDANTS'  
LIABILITY UNDER 42 U.S.C § 1983,  
THE AMERICANS WITH  
DISABILITIES ACT, THE  
REHABILITATION ACT AND THE  
WASHINGTON LAWS AGAINST  
DISCRIMINATION

ORAL ARGUMENT

August 29, 2019 – 10:00am

Thomas S. Foley United States  
Courthouse  
920 W. Riverside Ave, Room 840  
Spokane, WA 99201

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COMES NOW Plaintiff R.W., by and through his attorneys of record, and moves the Court for an order granting summary judgment establishing liability of defendants for the claim brought under 42 U.S.C. § 1983 and establishing liability for the claims brought under 42 U.S.C. § 12132 and 29 U.S.C. § 794. This motion is brought pursuant to Fed R. Civ. P. 56 and is supported by the Declaration of Eric B. Eisinger and the file and records contained herein.

### **I. SUMMARY OF THE ARGUMENT**

After suffering several sleepless nights in February of 2017, R.W. made an appointment with his primary care physician to receive treatment for insomnia and epileptic seizures that had worsened due to recent stress. While at the appointment, R.W. informed his physician that he was experiencing thoughts of physically harming his teachers. R.W. did the responsible thing by informing his physician of these thoughts. R.W. took no actions on these thoughts and did not disclose these thoughts to anyone other than his medical providers; R.W.'s physician did the responsible thing and referred his patient to Crisis Response where R.W. accepted voluntary evaluation and treatment. Crisis Response informed the Pasco Police who in-turn informed Columbia Basin College (CBC). Crisis Response quickly concluded that R.W. was not a threat to others.

Based on these communications to health care providers, CBC indefinitely trespassed R.W. from campus and found R.W. to be in violation of the Student

Code of Conduct for engaging in abusive conduct. It is undisputed that CBC sanctioned R.W. for seeking treatment from mental health professionals. The sanctions imposed by CBC violated R.W.'s right to free speech under the First Amendment. Further, CBC intentionally violated his rights as a disabled individual under the Americans with Disabilities Act (ADA), the Rehabilitation Act (RHA), and the Washington Laws Against Discrimination (WLAD). As a result, the Court should grant this motion for summary judgment establishing liability on the claim brought pursuant to 42 U.S.C. § 1983 as well as the claims brought under 42 U.S.C. § 12132, 29 U.S.C. § 794 and RCW 49.60.215.

## II. FACTS

R.W. was a student enrolled at the nursing program at CBC. In the Winter Quarter of 2017, R.W. was a student in good standing at CBC who had accumulated 177 credit hours towards a degree in nursing, with only 24 credit hours needed to achieve his degree. *Eisinger Decl. at Exhibit AH, ECF No. 37-34, pgs. 5-6; Eisinger Decl. at Exhibit D, ECF No. 37-4, pg. 4.* During his enrollment, R.W. was a disabled person suffering from chronic back pain, epilepsy, insomnia, anxiety and depression. CBC knew R.W. was disabled and provided R.W. with services through the Student Resources Center. *Eisinger Decl. at Exhibit X, ECF No. 37-24, pgs. 2; 5; Eisinger Decl. at Exhibit W, ECF No. 37-23, pg. 1.*

1 In February of 2017, R.W. saw an increase in the frequency of his epileptic  
 2 seizures which he attributed to stress. *Eisinger Decl. at Exhibit X, ECF No. 37-24,*  
 3 *pg. 5; Eisinger Decl. at Exhibit L, ECF No. 37-12, pg. 1.* These symptoms led to  
 4 R.W. experiencing trouble sleeping and insomnia. *Id.* On February 28, 2017,  
 5 R.W. contacted his primary care physician Dr. Michael Cabasug because R.W. was  
 6 having trouble with insomnia and was having violent thoughts regarding his  
 7 instructors at CBC. *Eisinger Decl. at Exhibit L, ECF No. 37-12, pg. 1; Eisinger*  
 8 *Decl. at Exhibit V, ECF No. 37-22, pg. 10.* R.W. was scheduled for an  
 9 appointment on March 6, 2017. *Eisinger Decl. at Exhibit V, ECF No. 37-24, pg. 5.*  
 10 From February 28, 2017 to March 6, 2017, R.W. attended classes at CBC with no  
 11 issues and did not mention these thoughts to anyone at CBC or elsewhere.  
 12 *Eisinger Decl. at Exhibit L, ECF No. 37-12, pg. 1; Eisinger Decl. at Exhibit H,*  
 13 *ECF No. 37-8 (hereafter "Reagan Dep."), Reagan Dep. 39:3 to 39:14; Reagan*  
 14 *Dep. 156:7 to 156:16; Eisinger Decl. at Exhibit Y, ECF No. 37-25, pg. 1; Eisinger*  
 15 *Decl. at Exhibit Z, ECF No. 37-26, pg. 3.* Before meeting with Dr. Cabasug, on  
 16 the morning of March 6, R.W. met with his instructor Kim Tucker who described  
 17 their interaction as follows:  
 18  
 19  
 20  
 21  
 22

23 3.6.17—asked Robert to stop by and see me to get his computer codes and access information for spring  
 24 clinical. He stopped by after class and was in a good mood and said thank you.

25 *Eisinger Decl. at Exhibit Z, ECF No. 37-26, pg. 3.*

1 R.W. met with Dr. Cabasug on March 6, 2017 and informed his physician of  
 2 his thoughts about hurting his instructors. *Eisinger Decl. at Exhibit L, ECF No.*  
 3 *37-12, pg. 1; Eisinger Decl. at Exhibit X, ECF No. 37-24, pg. 5.* Dr. Cabasug  
 4 recommended a change in R.W.'s drug dosage and spoke with R.W. regarding  
 5 techniques for managing stress. *Id.* Out of abundance of caution, Dr. Cabasug  
 6 referred R.W. to Lourdes, the Designated Crisis Responder for Benton and  
 7 Franklin Counties, for evaluation. *See RCW 71.05.020(14); Eisinger Decl., ECF*  
 8 *No. 37-24, pg. 5.* While at Dr. Cabasug's office, R.W. met with a representative of  
 9 Lourdes and thereafter voluntarily admitted himself to Lourdes Transition Center  
 10 for inpatient mental health treatment. *Id; Eisinger Decl. at Exhibit AA, ECF No.*  
 11 *37-27, pgs. 3-4.*

12  
 13  
 14  
 15 Unbeknownst to R.W., Lourdes contacted the Richland and Pasco Police  
 16 Departments regarding R.W.'s violent thoughts about his instructors at CBC.  
 17 *Eisinger Decl. at Exhibit J, ECF No. 37-10, pgs. 2; 5-7.* On March 7, 2017, the  
 18 Police Departments contacted CBC and informed them of the report. *Id.* This  
 19 information was sent from Mike Hahn to security supervisor Levi Glatt and in-turn  
 20 to Ralph Reagan, the Assistant Dean for Student Conduct and Activities. *Eisinger*  
 21 *Decl., ECF No. 37-10, pgs. 9-12; Reagan Dep. 23:20 to 24:12.* The  
 22 communication viewed by Mr. Reagan stated as follows:  
 23  
 24  
 25



1 Levi,

2 At approximately 0800 hours 3/7/17, I was contacted by Ofc. K. Erickson of PPD with the following information.

3 PPD was contacted earlier today by Crisis Response about CBC student [R.W.]. [R.W.] admitted to having homicidal ideations  
4 toward staff at CBC, talking about lighting offices on fire and  
5 attacking people with saws. The instructors specifically mentioned  
6 are Kim [T]ucker Valerie Topham and Alma Martinez.

7 [R.W.] is currently at Carondelet getting help and may not be an immediate threat.<sup>1</sup>

8 *Id.* That same day, Reagan issued a letter to R.W. that he was trespassed from  
9 campus on the basis that R.W.'s communications to medical professionals  
10 constituted "Abusive Conduct" under the CBC Student Code of Conduct. *Eisinger*  
11 *Decl.at Exhibit I, ECF No. 37-9, pg. 1.* Reagan was aware that R.W. was receiving  
12 services from the Student Resource Center before issuing the trespass and was  
13 aware R.W. was a student with a disability. *Eisinger Decl. at Exhibit W, ECF No.*  
14 *37-23, pg. 1.*

17 At the same time, R.W.'s instructors began falsifying reasons for R.W.'s  
18 dismissal from the nursing program. Instructor Valerie Topham, who had a self-  
19 described "complete meltdown," generated academic progress alerts stating that  
20 R.W. was showing a lack of effort, lack of progression/critical thinking and low  
21

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23  
24 <sup>1</sup> "Carondelet" is a commonly known way to describe Crisis Response in the Tri-  
25 Cities as Lourdes Counseling Center is located at 1175 Carondelet Drive in Richland, Washington.



examination scores even though R.W. was passing her classes. *Eisinger Decl. at Exhibit E, ECF No. 37-5, pgs. 1-2; Eisinger Decl. at Exhibit C, ECF No. 37-3 (hereafter “Cooke Dep.”), 85:13 to 85:16; 86:2 to 86:3.* The day after the interim trespass, Kim Tucker filled out a “Nursing Student Discontinuation Form” stating R.W. was discontinuing the program based on “incomplete winter quarter trespassed from campus.”

NURSING STUDENT DISCONTINUATION FORM			
Upon student discontinuing the nursing program, for any reason, this form will be completed by the Dean of Health Science OR Nursing Program Coordinator and placed in the students file.			
Student Name: <u>R. W. I.</u>	SID: _____		
(Circle One)		(Circle One)	
Discontinuation Date: <u>3-7-17</u>	Freshman/Sophomore	Student Plan to Return? YES/NO	
Reason for Discontinuing: <u>incomplete winter quarter trespassed from campus.</u>			
Dean's Signature: <u>Kim Tucker</u>		Date: <u>3/8/17</u>	
Comments: _____			

*Eisinger Decl. at Exhibit F, ECF No. 37-6, pg. 1.* The same day, Ms. Tucker drafted a (ultimately unsent) letter stating R.W. was dismissed effective immediately based on his breach of “professionalism standards as a nursing student,” citing R.W.’s communications with his medical providers.

March 8, 2017

R W  
1241 Columbia Park Trail  
Richland, WA 99352

Re: Dismissal from CBC Nursing Program

Dear R

This letter serves as notice that you have been dismissed from the CBC Nursing Program effectively immediately, based on your breach of professionalism standards as a nursing student. This breach included unprofessional and unethical communication as reported to the College by the Richland police department and Crisis Response Center dated 3/6/2017. The decision to dismiss is based on the "Professionalism Standards" outlined in the Nursing Student Handbook pp. 30-31:

*"Students will be regularly evaluated on their display of ethics and professionalism prescribed to by the nursing profession. A student may be dismissed from courses within the program or receive a failing grade solely based on ethics and professionalism."*

You will not be eligible to apply for re-entry to the Nursing Program. I understand you are meeting with Ralph Reagan, Assistant Dean for Student Conduct, to address additional implications of your behavior.

Sincerely,

*Eisinger Decl. at Exhibit AE, ECF No. 37-31, pg. 1; Eisinger Decl. at Exhibit AB, ECF No. 37-29, pg. 1.* Mr. Reagan initially approved of this course of action. *Eisinger Decl. at Exhibit AD, ECF No. 37-30, pg. 1.* At a CBC nursing faculty meeting on March 13, 2017, the staff was told R.W. "has been trespassed from CBC and will not return to the Nursing program."

R. W. has been experiencing grand mall seizures regularly and had met with Kim, Val and Peggy regarding those implications. A few days after that he made death threats to Kim, Val, and Alma while with his counselor. He has been trespassed from CBC and will not return to the Nursing program. R. W. will meet with Ralph Reagan in Student Conduct to determine further decisions. Ralph asked Leslie and Laura to serve on an intervention team.

*Eisinger Decl. at Exhibit AF, ECF No. 37-32, pg. 1.* On March 10, 2017, R.W. sent Reagan an e-mail asking for the interim trespass to be lifted so that R.W. could resume classes.

1           **From:** R W < >  
              **Sent:** Friday, March 10, 2017 3:17 PM  
              **To:** Reagan, Ralph  
              **Subject:** Re: Student Appeals Board

3           Mr. Reagan,

4           I apologize for the delay, I was in a form of treatment where access to the internet was unavailable for a certain period of time.

5           You were originally notified of my condition, but only to the extent required by law. I would like to plead my case by filling in the blanks.

6           I originally had some violent thoughts over a week ago, but never acted on them, instead I sought out treatment. After speaking with my primary care physician last Monday, I met with a crisis advisor, and spent every day since then in treatment at Lourdes. I was released today after it was determined by the staff at Lourdes and the crisis advisor that I was not a threat to myself or others. I have begun a medical regimen, including medication and outpatient counseling. The nurse practitioner at Lourdes that cared for me has offered to advocate on my behalf, and so has my Primary Care Physician. Please let me know if any documentation would help my case, and I will attempt to get it Monday for you.

9           I would very much like the opportunity to complete my degree with the nursing program, especially since I am close to finishing. I have developed new coping strategies to help with the stress I experienced, and I also have developed a care plan with the team of medical professionals in the unfortunate case that these feelings are ever to arise again.

11          Thank you very much,  
              R       W

13       *Eisinger Decl. at Exhibit L, ECF No. 37-12, pg. 1.* On March 14, 2017, the  
 14       Student Appeal Board affirmed the interim trespass. *Eisinger Decl. at Exhibit M,*  
 15       *ECF No. 37-13, pg. 1.* On March 22, 2017, R.W. sought additional review of the  
 16       interim trespass. *Eisinger Decl. at Exhibit M, ECF No. 37-14, pgs. 1-2.* On April  
 17       19, 2017, CBC interim president Lee Thornton modified the trespass to exclude the  
 18       Pasco CBC campus. *Eisinger Decl. at Exhibit N, ECF No. 37-15, pg. 1.* However,  
 19       as the nursing classes take place at CBC's Richland campus, R.W. remained  
 20       unable to attend his courses. *Reagan Dep. 59:11 to 59:15.* As the president,  
 21       Thornton had final authority in regard to violations of the Student Code of  
 22       Conduct. *WAC § 132S-100-415(5)(c)(iii).*

1 In conjunction with the interim trespass proceedings, Reagan began  
 2 investigating the purported violation of the Student Code of Conduct. *Eisinger*  
 3 *Decl. at Exhibit K, ECF No. 37-11, pg. 1.* On March 22, 2017, Reagan met with  
 4 R.W. and counsel for R.W. regarding the alleged violation. *Eisinger Decl. at*  
 5 *Exhibit V, ECF No. 37-22, pg. 7; Reagan Dep. 148:1 to 148:7.* As part of this  
 6 meeting, Reagan requested full access to R.W.'s private medical records which  
 7 were provided. *Id.* Reagan reviewed the medical records thoroughly, noting that  
 8 the health care providers had determined that R.W. was not a threat to others  
 9 before he was released from voluntary treatment and that he was continuing with  
 10 outpatient mental health treatment. *Eisinger Decl. at Exhibit U, ECF No. 37-21,*  
 11 *pgs. 1-4; Reagan Dep. 115:21 to 115:22.* Dr. Cabasug further wrote a letter  
 12 assuring CBC that R.W. "[n]ever has shown any aggressive behavior or language"  
 13 in the years Dr. Cabasug had acted as R.W.'s primary care physician. *Eisinger*  
 14 *Decl. at Exhibit AF, ECF No. 37-32, pg. 1.* After concluding his review, Reagan  
 15 explicitly attributed R.W.'s thoughts and violent ideations to R.W.'s disability as  
 16 set forth in an April 17, 2017 e-mail to Patricia Campbell, the Vice President of  
 17 Student Services:

18  
 19  
 20  
 21  
 22  
 23 The student's behavior and ideations created a hostile or intimidating environment for our staff and faculty whether he  
 24 intended to or not. Through my investigation, this seems to be an episode out of character for the student and was a  
 25 result of a combination of stress, anxiety, sleep deprivation, depression and possibly medication issues. Those concerns  
 are being treated and he has shown the medical professionals no serious concerns since those initial first days in  
 treatment, but he has continued outpatient treatment through their mental health provider and has no current  
 homicidal ideations. I am leaning towards dropping the trespass with the idea that he would have frequent follow ups  
 with me and allow us to have open communication with his therapist through him to confirm he has been attending all  
 his appointments and that no serious concerns have arisen.

1 *Eisinger Decl. at Exhibit AI, ECF No. 37-35, pg. 1.* Reagan confirmed this  
2 attribution in his deposition testimony:

3  
4 Q: So in part, you attributed his ideations to depression and insomnia.  
Do I understand that from you?

5  
6 Reagan: I mean, I guess yes. But I -- not like I'm diagnosing him. I  
7 just -- based on what I read through, what he's going through, and  
8 everything and what had led to it, stress and lack of sleep and things --  
9 you know, those kind of things, obviously.

10 Q: Those attributed to his ideations?

11 Reagan: Factor into it, yeah.

12 *Reagan Dep. 175:5 to 175:14.* Shortly thereafter on April 20, 2017, Reagan issued  
13 a finding R.W. responsible for violating CBC's policy on Abusive Conduct:

14 **WAC 132S-100-205 Abusive conduct.**

15 Physical and/or verbal abuse, threats, intimidation, harassment, online  
16 harassment, coercion, bullying, cyberbullying, retaliation, stalking,  
17 cyberstalking, and/or other conduct which threatens or endangers the  
health or safety of any person or which has the purpose or effect of  
creating a hostile or intimidating environment.

18 *Eisinger Decl. at Exhibit P, ECF No. 37-16, pgs. 1-2.* In making this finding,  
19 Reagan explained the violation as follows:

20  
21 As per our conversation at the meeting, you explained that you had  
22 homicidal thoughts due to stress and lack of sleep with the possibility  
23 of medication being a factor. When you had homicidal thoughts you  
24 immediately contacted your primary care doctor because you were  
25 concerned. Your doctor recommended that you go to Crisis Response  
and you were voluntarily admitted to Lourdes. I understand that the  
result of your behavior was not to create a hostile or intimidating  
environment, but it had the same effect. Therefore you are found  
responsible for violating our policy on Abusive Conduct.



1 *Id.* Reagan identified the “conduct” at issue as the thoughts in R.W.’s mind.  
 2  
 3 *Reagan Dep. 156:7 to 156:12.*

4 On May 4, 2017, R.W. appealed to the Student Appeal Board requesting  
 5 review of the finding of misconduct. *Eisinger Decl. at Exhibit Q, ECF No. 37-17,*  
 6 *pgs. 1-3.* On May 24, 2017, the Student Appeal Board affirmed the finding of  
 7 misconduct. *Eisinger Decl. at Exhibit R, ECF No. 37-18, pg. 1.* On June 7, 2017,  
 8 R.W. appealed to the President of CBC regarding the finding. *Eisinger Decl. at*  
 9 *Exhibit S, ECF No. 37-19, pgs. 1-3.* On June 12, 2017, Thornton as the final  
 10 decisionmaker upheld the finding of misconduct and the sanctions therein. *Eisinger*  
 11 *Decl. at Exhibit T, ECF No. 37-20, pgs. 1-4; WAC § 132S-100-415(5)(c)(iii).*

### 14 **III. ARGUMENT**

15 The Court should grant R.W.’s motion for partial summary judgment  
 16 establishing liability against CBC under the ADA, RHA and WLAD based on  
 17 CBC’s intentional discrimination against R.W. on the basis of his disability.  
 18 Further, the Court should conclude that Reagan and Thornton violated R.W.’s First  
 19 Amendment rights under 42 U.S.C. § 1983 and that these rights were clearly  
 20 established at the time of the violation.  
 21

22 No matter how CBC ultimately tries to characterize the facts, at the end of  
 23 the day, it is undisputed that CBC sanctioned R.W. based on speech he made  
 24 privately to his doctor while seeking medical treatment. The CBC decisionmakers  
 25

1 who found R.W. guilty of misconduct and levied discipline (“Sanctions”) against  
 2 R.W. explicitly attributed the “abusive conduct” to R.W.’s disabilities. Even  
 3 before considering the actions of CBC faculty to falsify reasons for R.W.’s  
 4 expulsion, these undisputed facts alone are dispositive. A State actor cannot  
 5 sanction a person under a student code of conduct by categorizing protected speech  
 6 as “abusive conduct.” Furthermore, a public accommodation, including a public  
 7 college, cannot discipline an otherwise qualified student they know is disabled for  
 8 seeking treatment for his disability. As a result, the Court should grant this motion  
 9 for partial summary judgment establishing liability in this action.

#### 12 **A. Summary Judgment Standard.**

13  
 14 Summary judgment is appropriate when, viewing the evidence in the light  
 15 most favorable to the nonmoving party, there is no genuine dispute as to any  
 16 material fact. *See, e.g., United States v. JP Morgan Chase Bank Account No.*  
 17 *Ending 8215*, 835 F.3d 1159, 1162 (9th Cir. 2016) (internal quotation marks  
 18 omitted).

#### 20 **B. The Court Should Grant R.W.’s Motion For Partial** 21 **Summary Judgment Because CBC, Reagan and Thornton** 22 **Violated R.W.’s First Amendment Rights Under 42 U.S.C §** 23 **1983.**

24 The Court should grant R.W.’s motion for partial summary judgment  
 25 because CBC violated R.W.’s rights under the First Amendment by finding R.W.  
 guilty of “abusive conduct” for seeking treatment from his doctor for violent



1 ideations he was experiencing. To establish liability under 42 U.S.C. § 1983, R.W.  
 2 must establish that “(1) the defendants acting under color of state law (2) deprived  
 3 plaintiffs of rights secured by the Constitution or federal statutes.” *Gibson v.*  
 4 *United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). A person deprives another of a  
 5 constitutional right, “within the meaning of § 1983, ‘if he does an affirmative act,  
 6 participates in another’s affirmative act, or omits to perform an act which he is  
 7 legally required to do that causes the deprivation of which complaint is made.’”  
 8 *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007)  
 9 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). Additionally, to  
 10 establish liability for monetary damages, R.W. must establish that his  
 11 constitutional rights were clearly established at the time of the violation. *Saucier v.*  
 12 *Katz*, 533 U.S. 194, 201 (2001) *receded from on other grounds*, *Pearson v.*  
 13 *Callahan*, 555 U.S. 223 (2009).

### 17 **1. CBC, Reagan And Thornton Violated R.W.’s First** 18 **Amendment Rights.**

19 The Court should grant R.W. summary judgment because even in the light  
 20 most favorable to the Defendants, CBC’s sanctioning of R.W. under the Student  
 21 Code of Conduct is a brazen violation of the First Amendment. In categorizing  
 22 R.W.’s speech to medical professionals as “abusive conduct,” CBC as a State actor  
 23 has infringed not only on the First Amendment rights of R.W. within the doctor-  
 24  
 25

1 patient relationship but has also sanctioned R.W. based on pure speech that does  
2 not fall within any recognized exception to the First Amendment.

3  
4 In the context of seeking medical advice, “the State may not, consistently  
5 with the spirit of the First Amendment, contract the spectrum of available  
6 knowledge.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Our courts have  
7 long recognized “the core First Amendment values of the doctor-patient  
8 relationship.” *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). The doctor-  
9 patient privilege reflects “the imperative need for confidence and trust” inherent in  
10 the doctor-patient relationship and recognizes that “a physician must know all that  
11 a patient can articulate in order to identify and to treat disease; barriers to full  
12 disclosure would impair diagnosis and treatment.” *Id.* (quoting *Trammel v. United*  
13 *States*, 445 U.S. 40, 51 (1980)).

14  
15  
16 “[T]he precedents of [the Supreme Court] leave no room for the view that,  
17 because of the acknowledged need for order, First Amendment protections should  
18 apply with less force on college campuses than in the community at large.” *Healy*  
19 *v. James*, 408 U.S. 169, 180 (1972). There are no special exceptions to the First  
20 Amendment for college campuses and such cases merely require “the application  
21 of well-established First Amendment principles” and are “governed by existing  
22 precedent.” *Id.* at 170.  
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Both on-campus or off-campus, “[t]here is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (concluding that the school’s Anti-Harassment Policy and definition of harassment was facially overbroad); *Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (policy prohibiting “any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment” based on race was facially unconstitutional); *see also Burge ex rel. Burge v. Colton Sch. Dist.* 53, 100 F. Supp. 3d 1057 (D. Or. 2015) (school district violated student’s First Amendment rights by punishing him for saying online that his teacher “needs to be shot”; and the teacher becoming “scared,” “nervous,” and “upset” did not justify punishment or make the speech a true treat).

In *College Republicans at San Francisco State University v. Reed*, a student group held an anti-terrorism rally where demonstrators stomped on paper-versions of flags for Hamas, Palestinian Liberation Organization and Hezbollah. 523 F. Supp. 2d 1005, 1007 (N.D. Cal. 2007). A student made a formal complaint to the University alleging the actions violated the student code of conduct. *Id.* at 1008. The University formally notified the group that it was under investigation for violating the student code requiring students “to be civil to one another and to

1 others in the campus community, and contribute positively to student and  
2 university life.” *Id.* at 1009. The University initiated formal disciplinary  
3 procedures and the matter went to hearing. *Id.* at 1010. The Student Organization  
4 Panel conducted a formal hearing and, after taking testimony and additional  
5 evidentiary submissions, found the College Republicans had not violated the code  
6 of conduct. *Id.* Nonetheless, the group brought an action against the University  
7 alleging the provisions of the code of conduct requiring (1) civility (2) prohibiting  
8 conduct that is “inconsistent with SF State goals, principles and policies”; and  
9 prohibiting “intimidation” and “harassment” violated the First Amendment. *See*  
10 *id.* at 1024-25.

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14 The Court began by noting that only well-defined and narrowly limited  
15 classes of speech fall outside the First Amendment:

16 These include the lewd and obscene, the profane, the libelous, and  
17 fighting words. Speech or expressive conduct that is directed to  
18 inciting or producing imminent lawless action and that is likely to  
19 incite or produce such action,” also is subject to regulation. In  
20 addition, the Constitution permits government to proscribe “true  
21 threats.” True threats’ encompass those statements where the speaker  
22 means to communicate a serious expression of an intent to commit an  
23 act of unlawful violence to a particular individual or group of  
24 individuals. Thus, a law that regulated or proscribed only one of these  
25 narrow categories of speech or expressive activity would not run afoul of the  
First Amendment. At least some of the prohibitions of the Student  
Code of Conduct and the Student Organization Handbook that  
plaintiffs challenge here, however, reach well beyond any of these  
narrow categories.

1 *Id.* at 1012 (internal citations and quotations omitted). The court concluded that  
 2 the code sections mandating civility and acting in accordance with the University’s  
 3 values did not fall within any exception to the First Amendment. *Id.* at 1021;  
 4 1024. In declining to enjoin the prohibitions on harassment and intimidation, the  
 5 court emphasized that harassment and intimidation standing alone was insufficient  
 6 to constitute a violation of the code of conduct. *Id.* at 1022. Instead, the harassing  
 7 or intimidating conduct would have to threaten or endanger the health or safety of  
 8 any person. *Id.* at 1023.

11 As applied to the case at hand, the undisputed evidence shows that CBC,  
 12 Reagan and Thornton violated R.W.’s rights under the First Amendment by  
 13 sanctioning R.W. for disclosures made to his doctor. As the case law establishes, a  
 14 student can only be sanctioned for conduct which falls within the narrow  
 15 exceptions to the First Amendment. Further, such a code can only apply to  
 16 conduct that is harassing or abusive, not speech. *See Pinard v. Clatskanie Sch.*  
 17 *Dist. 6J*, 467 F.3d 755, 764 (9th Cir. 2006) (“pure speech” is distinct from conduct,  
 18 even expressive conduct). Here, it is undisputed that R.W. did not engage in any  
 19 conduct whatsoever. The only facts that Reagan identified as violating the Student  
 20 Code of Conduct was: “When you had homicidal thoughts you immediately  
 21 contacted your primary care doctor because you were concerned.” Unperturbed by  
 22 the lack of conduct, Reagan “found [R.W.] responsible for violating our policy on  
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1 Abusive Conduct.” This finding and the accompanying sanctions were thereafter  
2 affirmed by CBC’s president Thornton and remain in place to date. These findings  
3 and the accompanying sanctions violate R.W.’s rights under the First Amendment.  
4  
5 As a result, the Court should grant this motion for partial summary judgment.

## 6                   2.     No Qualified Immunity.

7             The Court should conclude that R.W.’s rights under the First Amendment  
8 were clearly established at the time of the violation, rendering Reagan and  
9 Thornton illegible for qualified immunity. “[T]he ‘clearly established’ inquiry is a  
10 question of law that only a judge can decide.” *Morales v. Fry*, 873 F.3d 817, 821  
11 (9th Cir. 2017). To conclude that the right is clearly established, the court need not  
12 identify an identical prior action. *Scott v. Cty. of San Bernardino*, 903 F.3d 943,  
13 951 (9th Cir. 2018) (explaining that although the constitutional right must be  
14 clearly established, there need not be a case dealing with the particular facts to find  
15 the officer’s conduct unreasonable). Qualified immunity is only an immunity from  
16 suit for damages, it is not an immunity from suit for declaratory or injunctive  
17 relief. *See Hydrick v. Hunter*, 669 F.3d 937, 940–41 (9th Cir. 2012).

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21             To determine if a right is clearly established, the court should first “look to  
22 ... binding precedent.” *Chappell v. Mandeville*, 706 F.3d 1052, 1056 (9th Cir.  
23 2013) (*quoting Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996)). Absent  
24 binding precedent, the court should consider all relevant precedents, including  
25

1 decisions from the Supreme Court, all federal circuits, federal district courts, and  
2 state courts; in addition, the court should consider the likelihood that the Supreme  
3 Court or the Ninth Circuit would decide the issue in favor of the person asserting  
4 the right. *See Elder v. Holloway*, 510 U.S. 510, 512; 516 (1994).

6 In *LaVine v. Blaine School District*, high school student James LaVine asked  
7 his English teacher to critique a poem he wrote which alluded to school shootings.  
8 257 F.3d 981, 983-84 (9th Cir. 2001). LaVine submitted the poem on Friday,  
9 October 2, 1998. *Id.* at 984. The teacher, who read the poem and was concerned  
10 by its content, brought the poem to the school's counselor/psychologist. *Id.* at 984.  
11 The counselor had counseled LaVine regarding previous suicidal thoughts and had  
12 recently met with LaVine regarding a no-contact order between LaVine and his  
13 father. *Id.* The school had also recently been informed that LaVine had broken up  
14 with his girlfriend and the girl's mother had called the school complaining that  
15 LaVine was stalking her daughter. *Id.* Over the weekend, the teacher, counselor  
16 and vice principal met and tried to determine what course of action to take. *Id.* at  
17 985. The vice principal contacted the police department for guidance which  
18 suggested they contact crisis response. *Id.* The police contacted LaVine who told  
19 the officers he was not a threat and declined to submit to voluntary psychological  
20 examination. *Id.* At 8:00am on October 5, the school issued an emergency  
21 expulsion under Washington Administrative Code § 180-40-295 which allowed for  
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1 expulsion if the “student’s presence poses an immediate and continuing danger to  
2 the student, other students, or school personnel...” *Id.* at 986, n. 3. After meeting  
3 with a psychiatrist, LaVine was allowed to return to the school seventeen days  
4 later. *Id.* at 986.

6 Even though LaVine was allowed to return to school, he continued to appeal  
7 the expulsion because there was concern it would prevent him entering the  
8 military. *Id.* Months later, the school board affirmed the expulsion but agreed to  
9 re-write the expulsion letter to make it clear that LaVine was expelled for safety  
10 reasons and not disciplinary reasons. *Id.* Thereafter, LaVine brought an action  
11 against the school for violation of his rights by expelling him and maintaining “any  
12 letters in [LaVine's] file regarding his expulsion.” LaVine and the school district  
13 each moved for partial summary judgment on the First Amendment claim. *Id.* The  
14 trial court denied the school’s motion and granted LaVine’s motion and entered an  
15 “injunction preventing the school district from placing or maintaining any negative  
16 documentation in James LaVine's school file.” *Id.* at 987. The school district  
17 appealed. *Id.*

21 On appeal, the Ninth Circuit affirmed in part and reversed in part. *Id.* At the  
22 outset, the court recognized that “[a]lthough schools are being asked to do more to  
23 prevent violence, the Constitution sets limits as to how far they can go.” *Id.* While  
24 recognizing that schools are afforded substantial deference in the administration of  
25

1 public education, “deference does not mean abdication; there are situations where  
2 school officials overstep their bounds and violate the Constitution.” *Id.* at 988.  
3  
4 With this background, the court evaluated whether LaVine’s actions could result in  
5 substantial disruption with school activities. *Id.* at 989 (*citing Tinker v. Des*  
6 *Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). The court  
7 acknowledged that “[w]hen the school officials made their decision not to allow  
8 James to attend class on Monday morning, they were aware of a substantial  
9 number of facts that in isolation would probably not have warranted their response,  
10 but in combination gave them a reasonable basis for their actions.” *Id.* at 989.  
11  
12 Based on this, the court upheld the initial emergency expulsion as a non-  
13 disciplinary action despite the school’s overreaction. *Id.* However, even though  
14 the court concluded that the “emergency expelling James did not violate the First  
15 Amendment, the same cannot be said for the school’s placement and maintenance  
16 in James’ file of what the district court characterized as ‘negative documentation.’”  
17  
18 After it was determined there was no actual safety threat, the school was required  
19 to eliminate all the harmful effects of the expulsion and the continued maintenance  
20 of the file violated LaVine’s rights under the First Amendment. *Id.*  
21  
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23 As applied to the case at hand, *LaVine*, along with decisions across the  
24 country on the applicability of the First Amendment to campus speech codes,  
25 discussed *supra*, demonstrate that R.W.’s rights under the First Amendment were

1 clearly established at the time he was sanctioned and effectively expelled by CBC.  
2 In this case, it is undisputed that CBC's actions against R.W. were not based on  
3 student safety concerns, but instead were a punitive sanction for R.W.'s purported  
4 violation of the student code of conduct. It is further undisputed that R.W.  
5 engaged in no disruptive activity at the school at any point whatsoever. Indeed,  
6 CBC and Reagan knew that R.W. was not an imminent threat to the school based  
7 on the very first communication it received which stated: "[R.W.] is currently at  
8 Carondelet getting help and may not be an immediate threat."  
9

11 Even though CBC knew R.W. did not pose a threat to the school  
12 immediately and never uncovered any evidence to the contrary despite demanding  
13 gross invasions of R.W.'s privacy as part of the investigation, CBC and Reagan  
14 nonetheless upheld its sanctions of R.W. for the "abusive conduct" of seeking help  
15 from his medical provider. Indeed, those same sanctions set forth in Reagan's  
16 April 20, 2017 letter still remain in place to date. Any "reasonably competent  
17 public official should [have known] the law governing" their conduct prohibited  
18 them from sanctioning R.W. for speaking with his doctor to obtain medical  
19 treatment. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). As a result, the  
20 Court should conclude as a matter of law that qualified immunity is not available  
21 to Reagan and Thornton.  
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**C. The Court Should Grant R.W. Summary Judgment On His ADA, RHA And WLAD Claims Because The Undisputed Evidence Shows CBC Discriminated Against R.W. Based On His Disability.**

The Court should grant summary judgment to R.W. establishing liability because CBC discriminated against R.W. on the basis of his disability. The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Similarly, under the Rehabilitation Act, “[n]o otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial...” 29 U.S.C. § 734(a).

To prove that a public program or service violated Title II of the ADA, a plaintiff must show: (1) he is a “qualified individual with a disability”; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability. *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001) (citing *Weinreich v. Los Angeles County Metropolitan Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)). A claim under the Rehabilitation Act requires the

1 same elements, except the entity must receive federal financial assistance. *Zukle v.*  
 2 *Regents of Univ. of California*, 166 F.3d 1041, 1045 (9th Cir. 1999). The elements  
 3 for a claim of disability discrimination under the Washington Laws Against  
 4 Discrimination are the same, except the plaintiff does not need to prove deliberate  
 5 indifference to seek monetary damages. *Duval*, 260 F.3d at 1135, n. 10. Under the  
 6 RHA and ADA, the plaintiff must show the defendants acted with deliberate  
 7 indifference in treating the plaintiff disparately from others. *Id.* at 1139.  
 8  
 9

10 In *R.W. v. Bd. of Regents of the Univ. Sys. of Georgia*, student Ryan Wilkes<sup>2</sup>  
 11 was enrolled at Georgia State University. 114 F. Supp. 3d 1260, 1267 (N.D. Ga.  
 12 2015). Wilkes sought medical testing at the student health center, and disclosed  
 13 that he had been diagnosed with schizophrenia. *Id.* The nurse contacted the  
 14 school's psychologist because Wilkes was "exhibiting unusual behavior in his  
 15 ability to communicate." *Id.* Wilkes told the psychologist that he had experienced  
 16 visual and auditory hallucinations within the last two days, and the psychologist  
 17 believed Wilkes was hallucinating at the meeting itself. *Id.* Wilkes left the  
 18 meeting after being asked he had experienced "command hallucinations." *Id.* The  
 19 university then removed Wilkes from student housing and compelled him to  
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 24 <sup>2</sup> This is a pseudonym to avoid confusion with the R.W. who is the Plaintiff in the  
 25 case before this Court. The R.W. in Georgia is not the same R.W. as plaintiff in  
 this case.

1 undertake a risk assessment. *Id.* at 1268. At the assessment, Wilkes disclosed he  
2 had discontinued taking his medication for schizophrenia six months prior and his  
3 healthcare records disclosed that Wilkes' family indicated he had "a history of  
4 aggression, depression, anxiety, anger, language delays, poor social skills, temper  
5 tantrums, and sexual abuse." *Id.* at 1268-69. However, Wilkes had not engaged in  
6 disruptive behaviors in class or at student housing, nor had he made any threats to  
7 others. *Id.* at 1268. After review, the university conditioned Wilkes' continued  
8 enrollment on (1) taking medication and attending counseling; (2) the university  
9 having full access to medical records; (3) monthly reports from providers to the  
10 university; (4) mandatory risk screening if in noncompliance; and (5) exclusion  
11 from student housing. *Id.* at 1269-70. When the university told Wilkes he could  
12 not enter the student housing the next semester, Wilkes brought a lawsuit against  
13 the university alleging claims under the ADA and RHA. *Id.* at 1270.

14  
15 The University moved for summary judgment on Wilkes' claims under the  
16 ADA and RHA, arguing that Wilkes was not qualified and the actions taken by the  
17 university were not based on Wilkes' disability but because he posed a direct threat  
18 of harm to others at the university. *Id.* at 1283; 1285.

19  
20 In determining whether an individual poses a direct threat to the  
21 health or safety of others, a public entity must make an individualized  
22 assessment, based on reasonable judgment that relies on current  
23 medical knowledge or on the best available objective evidence, to  
24 ascertain: the nature, duration, and severity of the risk; the probability  
25 that the potential injury will actually occur; and whether reasonable

1 modifications of policies, practices, or procedures or the provision of  
2 auxiliary aids or services will mitigate the risk.

3 *Id.* at 1284 (*quoting* 28 C.F.R. § 35.139(b)). “The existence, or nonexistence, of a  
4 significant risk must be determined from the standpoint of the person who [makes  
5 the decision], and the risk assessment must be based on medical or other objective  
6 evidence.” *Id.* (*quoting* *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (emphasis  
7 added)). “The belief that a significant risk existed, even if maintained in good  
8 faith, does not relieve a defendant of liability.” *Id.* Plaintiff established that he had  
9 not engaged in any disruptive behavior and was cooperative with the risk  
10 assessment. *Id.* However the medical professionals at the university noticed  
11 behaviors that indicated Wilkes was experiencing psychosis and Wilkes’ medical  
12 records indicated that Wilkes had engaged in past acts of aggression, anger and  
13 violence. *Id.* After reviewing the standard, the court concluded that there was a  
14 genuine issue of material fact as to whether Wilkes posed a direct threat. *Id.*

18 As applied to the case at hand, the matter before this Court and the case in  
19 *Wilkes* bear some similarity. Where this case departs from *Wilkes* is that CBC at  
20 no point uncovered evidence that R.W. was a threat to anyone. As noted in  
21 *Bragdon*, there must be objective medical evidence that R.W. posed a direct threat  
22 to the safety of others, a good-faith subjective belief is insufficient. 524 U.S. at  
23 649. R.W. did not make any threats or engage in any conduct at CBC posing a risk  
24 to others. By the time CBC learned that R.W. had disclosed violent thoughts to his  
25



1 doctor, he was in voluntary treatment and had already be evaluated as not posing a  
2 risk of harm to others. Even Reagan belatedly came to the same conclusion (and  
3 nonetheless imposed discipline on R.W.). To defeat this motion for summary  
4 judgment, CBC would have to produce objective, medical evidence that R.W.  
5 posed a significant risk of harm to others. There is no such evidence.  
6

7 In this matter, the undisputed evidence shows that each of the elements  
8 under the ADA, RHA and WLAD are met. At the time R.W. was trespassed from  
9 campus and sanctioned under the Student Code of Conduct, he was a student in  
10 good standing at CBC. There is no dispute that R.W. was a disabled person who  
11 suffered from epilepsy, insomnia, anxiety and depression. Thus, R.W. was a  
12 qualified person with a disability. Similarly, there is no dispute as to the second  
13 element of the claim: R.W. was excluded from participation at CBC by being  
14 sanctioned under the Student Code of Conduct, excluded from classes, and  
15 trespassed from campus. Finally, CBC directly attributed the sanctionable  
16 “conduct” by R.W. to his disability and there is no evidence that R.W. posed a  
17 direct threat. As a result, the Court should grant the motion for partial summary  
18 judgment establishing liability for intentional discrimination under the ADA and  
19 RHA, as well as liability under the Washington Laws Against Discrimination.  
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#### IV. CONCLUSION

The actions of the Defendants in this matter demonstrate that discrimination against the disabled remains a systemic problem in our society. R.W. did what we would want any person in his situation to do: disclose concerning thoughts to his doctor and seek treatment. CBC then sanctioned and disciplined R.W. for this disclosure, trespassing him from campus and preventing him from taking his classes. CBC showed R.W. and other disabled students that it is not okay to come forward and seek treatment for mental illness. You will be punished. You will be stigmatized. We will treat you differently. These actions, in addition to being morally repugnant, violated R.W.'s rights under the First Amendment, the ADA, the RHA, and the Washington Laws Against Discrimination. As a result, the Court should grant the motion for partial summary judgment establishing liability under each of these causes of action and entitling R.W. to prospective injunctive relief against CBC, Reagan and Thornton in their official capacities, leaving the only unresolved issues as a trial on damages.

1 DATED this 3rd day of June, 2019.

2 s/Bret Uhrich

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Carl P. Warring: [carlw@atg.wa.gov](mailto:carlw@atg.wa.gov)

*s/ Bret Uhrich*

Bret Uhrich